

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

76-1131
76-1160

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NOS. 76-1131, 76-1160

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Pg 5

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES SEELEY CYPHERS and JAMES W. FERRO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL APPELLEE'S BRIEF

DAVID G. TRAGER,
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Eastern District of New York.

BERNARD J. FRIED,
DOUGLAS J. KRAMER,
Assistant United States Attorneys
Of Counsel.



PRELIMINARY STATEMENT

This supplemental brief is submitted in opposition to the supplemental brief of appellant Ferro in which he raises, for the first time, a claim under the Interstate Agreement on Detainers (hereinafter "Agreement"). Ferro contends that pursuant to Article IV of the Agreement, he is entitled to a reversal of the judgments of conviction and dismissal of the indictments 74 CR 322 and 75 CR 259 on the grounds that he had been brought from and returned to jail in Ohio without having been tried on these indictments.

STATEMENT OF FACTS

A full statement concerning the relevant dates of the various indictments material to this appeal may be found at Point II of the main brief filed by the government, p. 15 et seq.

On two separate occasions, appellant Ferro was brought from Ohio to the Eastern District of New York pursuant to writs of habeas corpus ad prosequendum.

On September 18, 1973, indictment 73 CR 848 was filed. Two days later, on September 20, 1973, a writ of habeas corpus ad prosequendum was issued in the Eastern District of New York. Thereafter, on October 12, 1973, Ferro appeared in the Eastern District without counsel and entered a plea of not guilty. At this October 12, 1973 appearance, Ferro was ordered held on the writ by the United States Marshals until November 15, 1973, presumably for trial (Transcript, October 12, 1973 pp. 14-15).

Sometime thereafter, Ferro left federal custody. Although there is no indication in the ^{1/}record as to when he was transferred from federal custody, at a proceeding on

^{1/} The docket sheet (73 CR 848) only indicates that the writ was satisfied.

November 16, 1973; there is a statement on the record that notwithstanding the Court's order of October 12, 1973, Ferro had been released to Ohio (Transcript, November 16, 1976 [sic], p. 3). Subsequent efforts to get Ferro back were, for some reason not appearing in the record, unsuccessful, (writ issued November 9, 1973, bench warrant November 16, 1973^{2/}, writ issued November 19, 1973, writ issued November 27, 1973), until a writ issued on January 25, 1974 finally caused Ferro to be produced in the Eastern District on February 5, 1974. Shortly thereafter, on February 19, 1974, Ferro moved to dismiss indictment 73 CR 848, citing United States v. Maze, 414 U.S. 395 (1974). On April 5, 1974 this indictment was dismissed.

According to the record, it appears that Ferro remained in federal custody until May 3, 1974, when he pleaded not guilty to indictment 74 CR 322. At this time, as the record indicates, he was ordered to remain in federal custody (Transcript, May 3, 1974, p. 8). There is nothing in the record to support appellants assertion that he was returned to Ohio during the summer of 1974 (Supplemental

^{2/} Ferro asserts that a detainer was lodged against him on November 30, 1973 (Supplemental Brief, p. 2). There is nothing in the record to support this assertion, though a bench warrant was issued on November 16, 1973.

Brief, p. 3). He was, thereafter, tried before a jury and convicted on March 5, 1976.

At no time during the proceedings below was the issue of the Interstate Agreement on Detainers raised.

POINT I

THE INTERSTATE AGREEMENT ON DETAINERS
IS NOT THE SOLE AUTHORITY UNDER WHICH
THE FEDERAL COURTS MAY OBTAIN STATE
PRISONERS FOR TRIAL AND ITS PROVISIONS
DO NOT APPLY TO WRITS OF HABEAS CORPUS
AD PROSEQUENDUM ISSUED PURSUANT TO
28 U.S.C. §2241(c) (5).

The issue whether the Interstate Agreement on Detainers ("Agreement") requires dismissal, with prejudice, of a federal indictment whenever a federal defendant who had been produced pursuant to a writ of habeas corpus ad prosequendum, 28 U.S.C. §2241(c) (5), is returned to State custody without being tried in the federal charge, was fully briefed and argued before this Court on September 13, 1976 in the case of United States v. John Mauro, et al., 76-1251, 76-1252, sub judice. A copy of the government's brief in the Mauro case is made a part of this brief and is filed herewith. It is contended, for the reasons advanced by the Government in the Mauro case, that appellant's claim that the Agreement requires vacation of his conviction and dismissal of the indictments should be rejected.

POINT II

THE FAILURE OF APPELLANT TO MOVE
TIMELY TO DISMISS THE INDICTMENT
CONSTITUTED A WAIVER OF THIS CLAIM.

The government contends, notwithstanding the decision on the substantive question of the applicability of the Agreement to a writ of habeas corpus ad prosequendum issued pursuant to 28 U.S.C. §2241(c)(5), that the appellant's failure to timely raise this claim constitutes a waiver of the issue under the Federal Rules of Criminal Procedure, Rules 12 (b)(1), 12(b)(2) and 12(f).

Rule 12(b) provides (in pertinent part):

Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

Rule 12(f) provides:

Effect or Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the

time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

It is our position, simply stated, that Article IV(e) of the Agreement, if implicated at all by the procedures employed here - and we contend that it is not - is not the type of defect which either "fails to show jurisdiction in the court or to charge an offense", the two cases in which the waiver provisions of Rule 12(f) do not apply. It seems plain that this language refers to subject matter jurisdiction which cannot under any circumstances be waived. Indeed, since Rule 12(b)(2) speaks of the failure of the indictment "to show jurisdiction in the court or to charge an offense", rather than of a defect in the institution of the prosecution which affects jurisdiction, it would not seem to support any other construction. See Wright, Federal Practice & Procedure (Criminal), §193, p. 405; cf. United States v. Sisson, 399 U.S. 267, 281-282 (1970) so construing similar language in Rule 34, Federal Rules of Criminal Procedure. Moreover, Rule 12(b)(1), by its terms, as held by the Supreme Court in United States v. Davis, 411 U.S. 233, 234 (1973), "applies to both procedural

and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial Court." Quite plainly, the Court is referring to subject matter jurisdiction.

This consideration aside, there is no reason why this type of defect which goes to the initiation of the prosecution, i.e., a claim that the return of a defendant to the sending state prior to trial in the receiving state causes the indictment, under Article IV(e), to be of no "further force or effect," should be deemed to affect the "jurisdiction" of the district court any more than numerous other defects, including those of constitutional dimension, to which the waiver provisions of Rule 12 have been applied. Thus, the Supreme Court only recently held that a claim that a grand jury had been unconstitutionally selected was waived by the failure to raise it before trial. United States v. Davis, 411 U.S. 233 (1973).

Moreover, an analogous case is United States v. Rosenberg, 195 F.2d 583, 602-603 (2d Cir.) cert. denied, 344 U.S. 838, (1952), where this Court held that the failure to timely assert a lack of jurisdiction over the person of the defendant constituted a waiver of such claim. A similar

result should obtain here where, in effect, the Article IV(e) sanction, if applicable, is only a statutory direction that the return of the defendant to the sending State constitutes a divestiture of personal jurisdiction over that defendant for the particular charge upon which he was delivered. There is no question but that the indictment continues to state an offense over which the Court has subject matter jurisdiction.

Additionally, and aside from the plain language of Rule 12(b), there is simply no reason of policy for concluding that a defect, of the kind alleged here, is jurisdictional and cannot be waived by a failure to move in a timely fashion. The statutorily created right to be tried before return to the sending state does not reflect a "principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" Palko v. Connecticut, 302 U.S. 319, 325 (1937), quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The Agreement was merely designed to facilitate the transportation of prisoners between jurisdictions and federal participation was not sought until the Supreme Court decided Smith v. Hooey, 393 U.S. 374 (1974). Thus, the Agreement, at least insofar as federal participation is involved, was based on speedy trial concerns. And, of course, the right to a speedy trial, if not timely asserted is waived. Barker v. Wingo, 407 U.S. 514, 530 (1972); United States v. Lustman, 258 F.2d 475 (2d Cir.) cert. denied, 358 U.S. 880 (1958). Thus, since the constitutional right, which underlies the Agreement's purpose, may be waived, the statutorily-created right certainly is also waivable. See People v. White, 33 AD2d 217, 221 (2d Dept. 1969).

In People v. White, supra, the Appellate Division, treating the requirement of the Agreement that trial be held within 120 days after a defendant is delivered to the receiving state, held that absent a demand, the provision was waived. The analysis of the White case is apt:

"The terms of the Interstate Agreement place a heavier burden upon the prosecution than the Constitution itself does. The latter mandates a speedy trial. The Agreement requires one within its short time limits unless a continuance be granted on the application of the prosecutor for good cause shown in open court. Under these circumstances it seems perfectly reasonable to require the prisoner to exercise his right promptly and not to contribute to further delay by his own doing. The terms of the Agreement are not self-executing and they require affirmative action on the part of the prisoner (State of New Jersey v. West, 79 N.J. Super. 379). Just as the constitutional right to a speedy trial may be waived (People v. Prosser, 309 N.Y. 353), so may the privilege conferred by the Agreement. The

evils which the Agreement was meant to remedy are less present when the delay is occasioned by the prisoner than when occasioned by the prosecution (see N.Y. Legis. Annual, 1957, pp. 40, 42 [Memoranda of Joint Legislative Committee on Interstate Cooperation]). A prisoner not brought to trial within the statutory period may not continue to participate in the proceedings indefinitely and then, at his pleasure, demand and be granted a dismissal of the indictment. We can see no useful social or correctional purpose which would be served by a contrary holding."

It is our contention, that the agreement should not be construed to permit a defendant to avoid the requirements of Rule 12(b) and then, "at his pleasure demand and be granted a dismissal of the indictment". People v. White, supra. To so interpret Article IV(e) and Rule 12(b) and (f) would simply be "sanctioning the playing of games" by a defendant. cf. United States v. Salzmänn, ___ F.2d ___ (2d Cir. slip. op. 29, 46, September 28, 1976) (concurring opinion per Feinberg, J.)

Since, as we have shown, the alleged defect here does not affect the subject-matter jurisdiction of the district court, the claim must have been made "prior to trial". Rule 12(b). If not, it is waived unless there has been a showing of cause to permit "relief from the waiver" Rule 12(f). There has been no such showing in this case. Accordingly, we submit that the waiver provisions of Rule 12 apply and the claim deemed waived.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
October 15, 1976

Respectfully submitted,

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ADDENDUM TO APPELLEE'S SUPPLEMENTAL BRIEF

76-1251
76-1252

To be argued by
CHARLES E. CLAYMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 76-1251, 76-1252

UNITED STATES OF AMERICA,
Appellant,
—against—
JOHN MAURO and JOHN FUSCO,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DAVID G. TRAGER,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1251, 76-1252

UNITED STATES OF AMERICA,

Appellant,

—against—

JOHN MAURO and JOHN FUSCO,

Appellees.

BRIEF FOR THE APPELLANT

¹Preliminary Statement

On this consolidated appeal, the United States appeals from two orders of the United States District Court for the Eastern District of New York (Bartels, J.), entered on May 17, 1976 and May 19, 1976 dismissing indictments against the defendants John Mauro and John Fusco for failure of the Government to comply with Article IV (c) of the Interstate Agreement on Detainers (Title 18, United States Code, Appendix).

Judge Bartels, in granting appellees' motions to dismiss the indictments, both of which charged criminal contempt in violation of 18 U.S.C. § 401, held that the Interstate Agreement on Detainers (hereinafter the "Agreement") requires dismissal, with prejudice, of outstanding federal charges whenever a federal defendant is returned to state custody without being tried on the

federal charges. The Government contends that where a state prisoner has been produced before a federal court pursuant to a writ of habeas corpus ad prosequendum issued under the explicit authority of 28 U.S.C. § 2241 (c) (5), the provisions of the Agreement are not invoked.

Statement of the Case

On November 3, 1975, in separate indictments filed in the Eastern District of New York, the appellees John Mauro and John Fusco were charged with criminal contempt of court, in violation of 18 U.S.C. § 401. Both appellees had refused to testify before a federal Grand Jury. At the time of these indictments, they were inmates in the custody of the State of New York serving sentences of three years to life and one year to life, respectively.

Pursuant to separate writs of habeas corpus ad prosequendum, issued November 5, 1975, each appellee was produced in the Eastern District of New York. These writs were issued under the authority of 28 U.S.C. § 2241 (c) (5), which provides for the issuance of such a writ against a prisoner, state or federal, when "[i]t is necessary to bring him into court . . . for trial." On November 24, 1975, the appellees were arraigned before Judge Bartels on the respective indictments and both pleaded not guilty.

Mauro and Fusco next appeared in court on December 2, 1975, at which time Judge Bartels endeavored to set a trial date. The Government informed the court that it would be ready to try the cases fairly soon or in February (GA 67).¹ Mauro's counsel stated that he would be en-

¹ Unless otherwise indicated, references are to pages of the Government's appendix.

gaged in February and agreed to a March 17, 1976 trial date (GA 70). Fusco's counsel accepted a February 4, 1976 trial date, although this was later adjourned as a result of illness on the part of Judge Bartels (GA 110).

After setting the trial dates, the district court turned to the question of where Mauro and Fusco should be lodged while awaiting trial. Judge Bartels remarked that the Metropolitan Correctional Center ("MCC") was "overcrowded" and then said: "You can't stay here from December to March 17" (GA 70).^{*} The Government agreed "to do whatever the court directed". The court then ordered the defendants returned to state custody stating: "Writ them down. You can leave them here a week and writ them down" (GA 70-71). Fusco had requested that he be allowed to return to State custody, and Mauro, while expressing a desire to remain at MCC, raised no objection to the court's ruling that he be permitted to remain only if there was room (GA 74). At no time did either Mauro or Fusco, both of whom were represented by experienced counsel, seek to invoke the provisions of the Agreement. Shortly thereafter they were both returned to State custody.

On March 2, 1976, a writ of habeas corpus ad prosequendum was issued for Fusco, and on April 14, 1976 a similar writ was issued for Mauro. Pursuant to these writs, they were produced in the Eastern District of New York on April 29, 1976 and April 26, 1976, respectively. Prior to this appearance each had moved, individually, for dismissal of their indictments on the ground that the Government failed to follow the procedures set forth in

^{*} The district court judge was addressing both Mauro and Fusco who had appeared before him at the same time. Obviously, however, the March 17 reference was relevant only to Mauro whose trial had just been scheduled on that date. Fusco would have had to be returned in time for trial, which had just been scheduled for February 4.

Article IV(e) of the Agreement, that is, that they had been returned to custody without having been tried on the federal indictments.

On May 17, 1976 Judge Bartels ordered Fusco's and Mauro's respective indictments dismissed, holding that the Government had violated Article IV(e) of the Agreement when it returned defendants to state custody in December before trying them on the pending federal contempt charges and that, therefore, the Agreement required that the indictments be dismissed with prejudice.³ In reaching this decision, Judge Bartels determined that the Agreement bound the federal government as both a sending State and receiving State for prisoners. Furthermore, the court held that even though the federal government employed a writ of habeas corpus ad prosequendum

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"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article IV

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." (18 U.S.C. Appendix).

rather than filing a detainer as required by the Agreement, the Agreement is "the exclusive means" for securing the presence of a state prisoner for purposes of federal prosecution. Thus, the district court determined that the provisions and sanctions of the Agreement should be applied. In effect, the court held that the Agreement, when available, had, by implication, repealed the 28 U.S.C. § 2241(c)(5) writ of habeas corpus ad prosequendum.¹

ARGUMENT

The Interstate Agreement on Detainers Is Not the Sole Authority Under Which the Federal Courts May Obtain State Prisoners for Trial and Its Provisions Do Not Apply to Writs of Habeas Corpus Ad Prosequendum Issued Pursuant to 28 U.S.C. § 2241(c)(5).

A. Introduction

The district court's holding that a writ of habeas corpus ad prosequendum issued pursuant to 28 U.S.C. § 2241(c)(5) should be treated as a detainer under the Agreement with the resulting application of the Agreement's provisions and sanctions is, in effect, a holding that the Agreement is the sole means by which the federal courts may obtain state prisoners for trials. Indeed, by this holding, the district court has determined that the traditional and time-honored writ of habeas corpus ad prosequendum no longer exists except as it may constitute a detainer under the Agreement.

¹ Of course, this holding is conditioned on a finding that the particular state has adopted the agreement. New York has done so. N.Y. Crim. Proc. L., § 580.20.

Thus, for all practical purposes, the district court has held that the Agreement, when available, impliedly repeals § 2241(c)(5). The Government submits that the district court decision is incorrect and there has been, erroneously, judicial legislation withdrawing from the federal statutory scheme a "necessary tool for jurisdictional potency as well as administrative efficiency . . ." *Carbo v. United States*, 364 U.S. 611, 618 (1961).

B. The Writ of Habeas Corpus Ad Prosequendum

It is instructive to turn, initially, to a history of the writ of habeas corpus ad prosequendum to determine if the Congressional enactment into law of the Agreement should be considered, without express recognition in the pertinent legislative history, to have impliedly repealed this writ.

In an opinion by Chief Justice Marshall, the Supreme Court, in *Ex parte Burford* 7 U.S. (3 Cranch) 448, 449 (1806), recognized that the term of "habeas corpus", as used in the 1789 Judiciary Act, 1 Stat 81-82 (1789), was a generic term and included the writ of habeas corpus ad prosequendum. See also *Price v. Johnson*, 334 U.S. 266, 281 (1948). One year later, in *Ex parte Bollman* (*Ex parte Swartwout*), 8 U.S. (4 Cranch) 75, 95-98 (1807), the Chief Justice held, in accord with the English practice, that the writ ad prosequendum was necessary to remove a prisoner in order to prosecute him in the proper jurisdiction. The Court found authority for such writs in the reference to habeas corpus contained in the first sentence of § 14 of the Judiciary Act.⁵

⁵ This sentence gave authority to "all the courts of the United States . . . to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute . . ."
1 Stat. 81 (1789).

A series of amendments dealing with habeas corpus followed the Judiciary Act of 1789. Relevant to this appeal was the 1875 amendment, Revised Statute Section 751 (1878), which, as the lineal derivative of the first sentence of § 14 of the Act, served as a modern version of the authority for writs ad prosequendum upon which Justice Marshall had relied in *Ex parte Bollman*. See *Carbo v. United States*, *supra*, at 616. Section 2241 took its present form in 1948 with explicit provision for the writ of habeas corpus ad prosequendum in subparagraph (c)(5).

Due to the supremacy of federal law, federal courts have the power to issue a writ of habeas corpus compelling the release of a prisoner from state custody. *Cunningham v. Neagle*, 135 U.S. 1 (1890); *Boske v. Comingore*, 177 U.S. 459 (1900). State courts, however, cannot compel the corresponding release of a person who is held in federal custody. See *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858); cf. 18 U.S.C. 4085. Thus, prior to the enactment of the Agreement, in order to obtain federal prisoners for trial on an outstanding state charge, formal extradition procedures were required. Additionally, since writs of habeas corpus were not recognized between states, extradition was also necessary for one state to obtain a prisoner from another state. See *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860).

C. The Agreement

The Agreement was designed to facilitate the transfer of prisoners between the states. However, it appears that federal participation was not sought until the Supreme Court decided *Smith v. Hooy*, 393 U.S. 374 (1969).

In the *Smith* case the Court held that the Sixth Amendment right to a speedy trial applies, even in a

case where the state could not compel the presence of a federal prisoner being detained in a federal institution. Because of this decision it quickly became apparent that there was needed a procedure to rectify the situation. A legal basis was necessary to recognize state requests for the custody of federal prisoners. This is clearly stated in Section 2, Article I, Interstate Agreement on Detainers Act. See also the letter of the Deputy Attorney General of the United States to the Chairman of the House Judiciary Committee:

"Last term the Supreme Court ruled that prisoners charged with State offenses have a right to speedy trial and that the State is under an obligation to make a 'diligent, good faith effort' to bring a defendant to trial within a reasonable time, even though he is serving a sentence of imprisonment in a Federal prison outside the State. *Smith v. Hooy*, 89 S.Ct. 575, 393 U.S. 374, 21 L.Ed. 2d 607 (1968). As a result of this case, a number of States are requesting production of Federal prisoners. While some States have offered to provide the local police authorities to transport the Federal prisoners to the jurisdiction in which State charges are pending, at the present time this procedure is not feasible because the Federal term must run uninterruptedly, and therefore the prisoner must remain in the custody of a Federal official. This means that prisoners are returned to the State for trial in the custody of a U.S. marshal and arrangements must be made for Federal payment for the prisoner's lodging in an approved State jail with reimbursement by the State for the expenses involved. Article V of the Agreement provides that the appropriate authority in the receiving State could be entitled to temporary custody and that during the continuance of temporary custody time being served

on the sentence shall continue to run. (Article V(a) and (f).)" (1970 U.S. Code Cong. & Admin. News, 4867, 4868.)

It is significant that the Department of Justice, in the above-quoted letter of the Deputy Attorney General, endorsed the Agreement in large part because of the number of states requesting production of federal prisoners. Since federal custody of state prisoners for disposition of federal detainees is routinely obtained by removal and transfer anywhere within the United States by use of the writ of habeas corpus ad prosequendum, issued under 28 U.S.C. § 2241(c)(5), there was no corresponding United States need for such an Agreement. The United States would continue to utilize the § 2241(c)(5) writ of habeas corpus ad prosequendum. See *United States v. Carbo, supra*.

The Senate Report, 1970 U.S. Code Cong. & Admin. Laws, 4864, shows that Congress, in adopting the Agreement, was aware of and approved the idea of providing an avenue by which federal inmates could initiate the speedy disposition of their outstanding state detainers and of permitting federal custody to run even when the states paid for that custody.⁶ The purposes of the Agreement, as well as all other references to the future par-

⁶In the section entitled "Need for the Legislation", the Senate Report states an additional reason for adopting the Agreement:

"Although a majority of detainees filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound pre-release program." (1970 U.S. Code Cong. & Admin. News, 4866).

This reason is, however, of secondary importance. The main impetus to adoption of the Agreement was the *Smith v. Hooy* case, *supra*.

participation of the United States in the Agreement's legislative history, therefore, uniformly cast the United States in the role of a sending, and not a receiving State. See Senate Report, *supra*, at 4864-69.

Indeed, it is significant that the portion of the Senate Report, entitled "Impact and Cost", *id.* at 4867, considers only the effect of the Agreement on State detainees lodged against federal prisoners where the United States would become the sending State. There is no suggestion that the United States would ever be a receiving State. Certainly, this denotes a Congressional recognition of the continued viability of the writ of habeas corpus ad prosequendum as the means by which the federal government would obtain state prisoners for trial. *Accord*, Report of the Committee on the Administration of the Criminal Law to the Judicial Conference of the United States, February 1968, Agenda D-11, page 6; Eugene Barkin, *Impact of Changing Law Upon Prison Policy*, 48 Prison J. 310 (1968).

Although the United States is denominated a "state" by Article II of the Agreement, and thus would seem to be a "receiving state" within Article III, "(i)t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit, nor within the intention of its makers." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892); see also *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975).

As Judge Learned Hand observed, "[t]here is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark for over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it." *Federal Deposit Insur-*

ance Corp. v. Tremaine, 133 F.2d 827, 830 (2d Cir. 1943). Judge Bartels was cognizant of this principle (GA 19) but ruled that the Congress had not manifested a desire to limit the role of the United States to that of a "sending state". The Government submits that this is incorrect and that the spirit and intent of Congress has been "sufficiently disclosed" in this regard to establish that the United States is a sending, but not receiving, state under the Agreement and that the Agreement has not replaced the writ of *habeas corpus ad prosequendum*.

Congressional intent is further illuminated by the purposed Criminal Justice Reform Act of 1975 (S-1), Section 3201(a), which provides, in part:

"(a) Adoption of Agreement by the United States
—The United States solely as a 'sending state',
and the District of Columbia are parties to the
Interstate Agreement on Detainers. . ."

This Senate Committee on the Judiciary Report on S-1 states that Section 3201 the existing enabling act of the Agreement:

"has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of sending state. Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ".

We disagree with Judge Bartels' opinion that this proposed section and the Senate Report do not accurately

reflect the Congressional intent as it existed at the time of the 1970 enactment of the Agreement (GA 13). It is important to note that of the fifteen present members of the Judiciary Committee, twelve were also members of the Committee in 1970, when their first report on the Agreement was issued (Senate Report 91-1356). Thus, their expression of original Congressional intent, that the federal government participate in the Agreement only as a sending State and that the Agreement not supplant the writ of habeas corpus ad prosequendum, should be given great weight.²

²The Speedy Trial Act of 1974, 18 U.S.C. §1361 *et seq.*, was enacted after the adoption of the Agreement and is helpful in further revealing what Congress intended. Subsection (j) of Section 3161 of the Speedy Trial Act provides:

"(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

"(A) undertake to obtain the presence of the prisoner for trial; or

"(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

"(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

"(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

"(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that

[Footnote continued on following page]

Furthermore, in holding that the writ of habeas corpus ad prosequendum was in effect supplanted by the Agreement, the district court disregarded a fundamental rule of statutory construction. Where the Congress has expressly legislated concerning a particular subject matter, this express legislation should not be deemed to be implicitly repealed by subsequent legislation, especially where the subsequent legislation is not even concerned with the identical subject matter. *Rosecrans v. United States*, 165 U.S. 257 (1897). Instead, the court must reconcile the conflicting legislation, if at all possible. *McCool v. Smith*, 66 U.S. (1 Black) 459 (1861); *Furman v. Nichol*, 75 U.S. (8 Wall) 44 (1868). Thus, the express provision for a writ of habeas corpus ad prosequendum which appears in § 2241(c)(5) cannot be held to have been repealed by the Agreement, as the district court held.

Moreover, the Agreement should be construed to eliminate conflict with § 2241(c)(5). This may be achieved by holding that when federal-removal and transfer is necessary to dispose of an outstanding *federal detainer*, the federal writ of habeas corpus ad prosequendum applies. However, on the other hand, when a State requests the production of a federal prisoner to dispose of an outstanding *state detainer*, the Agreement applies.

attorney for the Government (subject, in cases of inter-jurisdictional transfer, to any right of the prisoner to contest the legality of his delivery)."

Although Congress had adopted the Agreement only a few years earlier, it indicated in the Speedy Trial Act that there are no prescribed means by which the federal government must obtain a prisoner, but only that the prisoner should be obtained. This strongly suggests that the writ of habeas corpus ad prosequendum remains available to the federal government as an alternative to the filing of a detainer under the Agreement.

Indeed, to construe the Agreement as rendering the § 2241(c)(5) writ of habeas corpus ad prosequendum the functional equivalent of a detainer under Section 2, Article III(a) of the Agreement would in practical effect reduce the judicial writ of habeas corpus to no more than a nonjudicial administrative detainer. This result would be compelled by the very language of the Agreement itself, which provides that "the Governor of the sending State may disapprove the request for temporary custody or availability" (Article IV[a]); a refusal which is not susceptible of further review. This lack of enforceability is contrary to the result that normally obtains in connection with a writ of habeas corpus, 13 U.S.C. § 401 (3); cf. *In re an Order Authorizing the Use of a Pen Register*, — F.2d — (2d Cir. Slip op. 4903, 4914, July 13, 1976). Moreover, the very language of this provision excludes the United States from availing itself of this option. Therefore, it would strain recognized principles of statutory construction to conclude that Congress intended the Agreement to abrogate the § 2241(c)(5) writ of habeas corpus ad prosequendum.

In holding that the Agreement is now the exclusive means by which the federal government can obtain the temporary custody of a State prisoner, the district court relied on the case of *United States ex. rel Esola v. Groomes*, 520 F.2d 830, 836-837 (3rd Cir. 1975). *Groomes*, however, concerned the transfer of a federal prisoner confined at the Federal Correctional Institution, Danbury, Connecticut, to the temporary custody of New Jersey, the receiving State. After having been transferred four times between Danbury FCI and New Jersey, Esola was tried and convicted in New Jersey. Following exhaustion of his state remedies, Esola brought a § 2254(b) petition to have his state conviction voided on the ground that New Jersey had violated the terms of the Agreement. The District Court dismissed the petition. The Third Circuit

reversed and remanded, stating that "we decide no more in this case than that a cause of action is stated by the apparent failure of New Jersey to comply with the terms of the Agreement" *Id.* at p. 839.

Thus, the holding in *Groomes* "that the Agreement provides the exclusive means of transfer when it is available" must be read in context. The case concerned the transfer of a federal prisoner to state custody and an intervening return to the federal sending jurisdiction before he was tried in the state court. There is no analysis relating to the converse situation: the transfer of a state prisoner to federal custody with an intervening return to the state jurisdiction before trial in the federal court. Accordingly, the court's reliance on *Groomes* is misplaced. And *United States v. Ricketson*, 498 F.2d 367 (7th Cir. 1968), *cert. denied*, 419 U.S. 965 (1974), also cited by the court, is not supportive of the decision below. The *Ricketson* Court explicitly held that it "need not decide whether the Agreement is exclusive when it applies". *Id.* at 373. Indeed, the Court, in *Ricketson*, held that the "Agreement [was] inapplicable". *Ibid.* But see, *People v. Bernstein*, 344 N.Y.S. 2d 786 (Dutchess County Court, 1973) where the court held that the sanctions of the Agreement only come into play when the prisoner, who has been returned to the sending state before trial in the receiving state, was himself ready for trial at the time he is brought into court. The court held that a strict construction of the Agreement is "impractical and unduly harsh [and] this literal interpretation would limit the appearance of defendants in State courts for the purpose of pre-trial motions and procedures." *Id.* at pp. 787-788.

Indeed, a result similar to *Bernstein* is appropriate in this case, where the writ of habeas corpus ad prosequendum, and not the Agreement, was issued to bring the defendants before the district court for the purpose of arraignment and the setting of a trial date. The provi-

sions of the Agreement were never invoked by the Government, the defendants or the court. To the contrary, the proceedings of December 2, 1975 demonstrate that the appellees were not produced in the Eastern District under the Agreement. Cf. *United States v. Ricketson*, *supra* at 373.

After setting trial dates, the district court inquired as to where the defendants were to be kept before trial and remarked "you can't stay [here] from December to March 17 . . . It's overcrowded". The prosecutor agreed to do whatever the court desired. No objections were raised to the court's ruling by Mr. Mauro or Mr. Fusco, and in fact Mr. Fusco requested that he be returned to the state prison (G.A. 70-74).⁸ Mr. Mauro expressed a desire to remain, only if the warden had no objection (G.A. 74). The Court then ruled that they would stay only if the warden agreed, and Mauro consented to this ruling.

Finally, it is plain that the purposes of the Agreement are not served by a literal reading of its provisions. For instance, had one of the defendants below been incarcerated in a state not party to the Agreement,⁹ that de-

⁸ When the Government complied with his request, he complained that he had been returned to his sending institution without having been tried, a violation of the Agreement. On this basis, his indictment was dismissed. The Government contends that Fusco should have been estopped from asserting such a claim in these circumstances. He should not be permitted to exploit his return to his sending institution, because it was primarily attributable to his own request and consent. Compare *United States v. Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). Similarly, appellee Mauro's consent to his return should have estopped him from seeking a dismissal of his indictment. See also, *People v. Bernstein*, *supra* at 787: "This defendant cannot take advantage of his own actions."

⁹ According to information supplied by the Council of State Governments, these states presently include Alabama, Alaska, Mississippi, and Oklahoma.

fendant would not have been able to obtain dismissal of his indictment even had he been returned to his sending institution after his arraignment. But, his co-defendant, treated in exactly the same manner by the federal government, would be permitted to escape trial on the indictment because, if the decision below is considered to be correct, the provisions of the Agreement were violated. This inequitable result would make a mockery of federal legislation designed to achieve uniform application of the law.

Therefore, if the decision below is upheld, it would mean that the Congressional adoption of the Agreement has repealed 28 U.S.C. § 2241(c)(5); has arbitrarily discriminated against prisoners held in custody by non-party states; and has granted authority to the governors of the party states to defeat lawful federal process. There is no support for these drastic changes in the delicate federal-state relationship in the Agreement itself or the legislative history. On the contrary, as the Senate Report makes clear, the Agreement was not intended to affect the writ of habeas corpus ad prosequendum issued under the authority of § 2241(c)(5).

CONCLUSION

The Orders of the District Court should be reversed.

Dated: July 26, 1976

Respectfully submitted,

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¹⁰ The United States Attorney's Office wishes to acknowledge the invaluable assistance of John A. Records in the preparation of this brief. Mr. Records is a third year law student at the New York University School of Law.



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